



# PARTNERSHIPS IN TRANSIT

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## Legislative Perspective

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# Is Legislation Needed? If So, What Should It Say?

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- Authority to contract
- Procurement issues
- Payment/performance bond requirements
- Funding issues
- Other issues



# Authority to Contract

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Agency may have ability to proceed without need for new legislation

- New Jersey Transit
- Portland Airport MAX
- JFK Airtrain



# Authority to Contract

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- Ability to bundle:
  - Design
  - Construction
  - Operations
  - Maintenance
  - Finance
- Authority to enter into multi-year contracts
- Authority to enter into leases
- Limitations on “contracting out”

# Procurement Issues

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Requirements for procurement of different aspects of contract may be incompatible

- Design contracts based on qualifications
- Construction contracts based on price and complete plans
- Leases based on price



# Procurement Issues

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- Is prequalification/short-listing allowed?  
(not contemplated by Model Procurement Code)
- Are pre-proposal one-on-one meetings allowed?
- Competitive sealed proposals vs. bid?
- Best value selection vs. low bid?
- Are pre-award negotiations allowed? (not under Model Procurement Code)
- Requirement to list subcontractors in bid?

# Procurement Issues

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- Are required evaluation criteria consistent with desired approach?
- Must the project go to the legislature for approval?
- Do local agencies have approval rights?



# Payment/Performance Bond Requirements

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- Market limitations on large bonds
  - Typical requirement 100% of contract value
  - Model Procurement Code allows reduction to 50% but that may also be too high
  - Consider allowing reduction to amount determined reasonable by agency
- Some potential participants may not have relationships with sureties
  - Consider allowing alternative security





# Funding Issues

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- How/when will payments be made? Does payment obligation constitute long-term debt subject to legal constraints?
- Who receives farebox? Who has rate setting authority? When/how can rates be changed?
- What restrictions are tied to identified sources of funds?



# Funding Issues

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- Who can issue debt? (Washington statute requires indebtedness to be issued by state treasurer)
- Can agency issue revenue bonds?
- Can you create a non-profit to sponsor?
- Authority to access TIFIA?
- Authority to issue private activity bonds?



# Where to Look for Legislative Precedent (if needed)

- Project-specific statutes (LAX/Palmdale)
- Agency-specific statutes
  - Louisiana Transportation Authority
  - Los Angeles Metro
  - Maryland Transportation Authority
- Statutes applicable to multiple agencies (CA, DE, NV, VA, WA)
- ABA Model Code (ABA, HI, MD)
- Nossaman
- Non-profit approach (MI)



# Other Issues to Consider in Drafting Legislation

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- Property and local sales/excise tax exemption
- Labor protection (union contracts and Section 13(c) issues)
- Transit-oriented development (legislative provisions that allow/encourage/discourage)
- Condemnation/eminent domain
- Other business opportunities
- Stipends to unsuccessful proposers

# Other Issues to Consider in Drafting Legislation

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- State Public Records laws – ability to protect confidentiality of proposals, evaluations and negotiations prior to award
- Protection against subsequent legislative action
- Restrictions on use of right of way
- Sovereign immunity



# Contact

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